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CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, 1923

THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant
v.
THE UNITED STATES
No. 248

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

The Illinois Central Railroad Company, a land-grant railroad, presented to the Government for payment certain accounts for the net freight for the transportation of coal and other articles after making the proper land-grant deductions, and payment was made to it of the full amount and accepted without protest.

Without any charge of fraud, misrepresentation, or deceit, the company subsequently brought suit on substantially the following statement of facts which are taken from the findings of the Court of Claims.

In 1914, Major Hoffman, Corps of Engineers, contracted with Chicago & Carterville Coal Co. to furnish coal for river improvements in the vicinity of Dubuque, and the coal was shipped during that year from Herrin to Dubuque. In the same year he also contracted with the Colleries Sales Company for coal for the same purpose, which was shipped during that year from Eldorado to Dubuque. In 1915 and 1916 he made two contracts, one in each year, with Rutledge & Taylor Coal Company for coal for the same purpose, which was shipped during 1915 and 1916 from Duquoin to Dubuque. (Tr. 4.)

Under the four contracts, the coal was delivered "on board cars at the different mines, and was shipped over plaintiff's lines therefrom to Dubuque on Government bills of lading furnished to said coal companies by the Government, which were duly accomplished, the coal inspected and accepted at that place by the proper Government officials." The total land-grant deductions on the shipments made by the Illinois Central in stating its own bills amounted to $5,234.61. (Tr. 4, 5.)

During 1911, 1912, 1913, and 1915 numerous shipments of materials and supplies, such as coal, stone, lumber, hardware, and other articles for use in Government improvements on the Missouri River were made over the Illinois Central from points in Illinois, South Dakota, Missouri, Mississippi, and Louisiana to Sioux City and other points in Iowa and Omaha. The material and supplies were all purchased on invitation to bidders, proposals of bidders, and

vouchers, on which payments were made to the sellers. The form of invitation on which bids were made invariably read: "The prices will be for the articles delivered f. o. b. cars at ———. The successful bidder will procure the cars, but the United States will pay the freight and furnish shipping instructions and bills of lading. This arrangement is made to enable the Government to take advantage of land-grant rates, and will not operate to relieve the dealer of any responsibilities as shipper that would attach if the delivery had been at destination." (Tr. 5.) This form of invitation was only used over land-grant or bond-aided roads and was never used where delivery was to be made at point of use.

The shipments were all made on Government bills of lading, which were accomplished, the articles inspected and accepted at points of use by the proper Government officials. The total land-grant deductions on such shipments made by the Illinois Central in stating its bills amounted to $9,695.27. (Tr. 5.)

The Government official, examined as to the purchase of the above articles, produced the form of invitation quoted—one bid and one voucher, upon which payment was made. Land-grant deductions were made more than six years prior to the filing of the suit on March 23, 1918, amounting to $2,511.68. (Tr. 5.)

On June 3, 1914, Colonel Judson, Corps of Engineers, entered into a contract with Lumber Manufacturers' Agency of Centralia, Wash., for 888,720 feet b. m. fir timber for breakwater repairs in the

Chicago district to be delivered on board cars at the company's mills, and to be inspected, both at the mills and at the point of delivery, before acceptance and payment.

On August 5, 1914, Major Cavenaugh, Corps of Engineers, entered into a contract with Union Lumber Company, Union Mills, Wash., for 2,793,180 feet b. m. for timber to be delivered on board cars at the company's mills, the timber to be used for constructing part of the exterior breakwater at Chicago. Inspections were to be made at the company's mills and final inspection at point of delivery before acceptance and payment. Deliveries were made as required by the two contracts and timber was all inspected at the mills and afterwards at Chicago and was accepted and paid for in accordance with certificates of the Engineer officer in charge of the work. The shipments were made on Government bills of lading and were partly over the lines of the Illinois Central. The total land-grant deductions made by the Illinois Central in stating its bills amounted to $9,340.18. (Tr. 6.)

On August 15, 1916, the Government advertised for sealed proposals to furnish and deliver cement for use on revetment work on the Mississippi River at Vicksburg. The specifications furnished to prospective bidders stated that proposals would be considered for delivery f. o. b. cars at point of manufacture, and f. o. b. cars on the Government warehouse switch at Vicksburg. The Carolina Portland Cement Co. of New Orleans, on August 26, 1906 (1916), proposed to furnish 10,000 barrels at $1.44½

per barrel f. o. b. cars point of manufacture, Leeds, Ala., or f. o. b. cars at Vicksburg, $1.90 per barrel. The proposal was accepted at $1.44½ per barrel f. o. b. cars Leeds. The cement was shipped in 1916 over plaintiff's lines to Vicksburg on Government bills of lading, which were accomplished, and the cement tested and accepted by the proper Government officials. The total land-grant deductions on such shipments made by the Illinois Central in stating its bills amounted to $251.24. (Tr. 6.)

On August 7, 1915, Major Markham, Corps of Engineers, in charge of certain Government work on the Mississippi River, headquarters at Memphis, wrote to the Bucyrus Company of South Milwaukee, Wis., inviting a proposal to furnish and install a concrete mat revetment plant. On September 8, 1915, the company proposed to deliver the plant at South Milwaukee in 14 weeks from date of order for $9,500, or to deliver same at South Milwaukee in 10 weeks from date of order for $9,775, and to put up and install the plant at Memphis and furnish an operator for two weeks for $1,175 additional. On September 13, 1915, the proposal of the company was accepted for delivery at South Milwaukee in 10 weeks, with certain changes of price and construction, which appear to have been accepted. The plant was shipped over the Illinois Central lines to Memphis on two Government bills of lading, which were duly accomplished, the plant erected and, after proper tests, paid for by the Government. The land-grant de-

duction made by the Illinois Central in stating its bills amounted to $81.74. (Tr. 7.)

On June 5, 1914, Richard E. Egglebrecht, St. Louis, entered into a contract with the United States, through Capt. F. G. Stritzinger, Quartermaster Corps, to furnish and deliver by June 30, 1915, free on board cars at Carterville, Ill., 13,500 tons of coal to be paid for after delivery at Omaha, at the rate of $1.56 per long ton. On June 1, 1916, Nebraska Fuel Co. entered into a contract with the Government, through Col. G. S. Bingham, Quartermaster Corps, to deliver free on board cars at Duquoin, Ill., coal in such quantities and at such times as might be required by the receiving officer or agent of the Quartermaster Corps, payment to be made at Omaha at the rate of $1.739 per short ton, which included the cost of unloading and storing in bins. The coals so furnished were shipped from Carterville and Duquoin over plaintiff's lines to Omaha on Government bills of lading, which were duly accomplished and the coal inspected and accepted at that place by the proper Government officials. On said shipments land-grant deductions made by the Illinois Central in stating its bills amounted to $159.29. (Tr. 7.)

The Government form of bills of lading used in the transportation of the articles in question provided on its face for the hauling of the Government property only, and the directions on the back limited their use to Government property. The agreement on the back between the United States and the carrier stipulated that prepayment of charges should in no

case be demanded by the carrier, nor should collection be made from the consignee; that on presentation to the office indicated on the face of the bill of lading properly accomplished, attached to freight voucher prepared on authorized Government form, payment would be made to the last carrier unless otherwise specifically stipulated; that the shipment was to be made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate would be available unless otherwise indicated on the face of the bill of lading. (Tr. 8.)

The Court of Claims dismissed the petition (Tr. 8, 13) with judgment to the Government against the Illinois Central for the cost of printing the record (Tr. 33). This appeal was then taken.

ARGUMENT

I

WHEN THE ILLINOIS CENTRAL PREPARED, RENDERED, AND RECEIVED PAYMENT FOR ITS OWN ACCOUNTS WITH THE LAND-GRANT DEDUCTIONS, THE TRANSACTIONS WERE CLOSED BY ITS OWN ACTS AND MAY NOT BE REOPENED BY THE PETITION FILED IN THIS CASE.

The basis of the petition on which the Illinois Central seeks to recover the amount of the land-grant deductions is the single, narrow fact that all of the coal and other articles were shipped f. o. b. the mines with the right of inspection by the Government at the point of delivery or at the points both of origin and delivery. The claim appears to

be that such a condition in the terms of purchase and sale convert the shipments from Government shipments to shipments of the consignors who are not entitled to land-grant deductions and suit is then brought *against the Government* (not against the consignors) for the full amount of the tariff charges.

It does not appear, nor is it material, when the coal and other articles were received and transported and when the bills were rendered and payment received, whether the Illinois Central was or was not informed of the conditions of the contracts or orders with respect to inspection and acceptance at the point of destination, or when, if thereafter, it was so informed. (Tr. 8.)

However, if it was not all within the knowledge of the Illinois Central, its officers and agents, at the time, upon their acquiring knowledge they never made any charge of fraud, misrepresentation, or deceit. That they were Government shipments for which the Government was liable for transportation is an undisputed fact as between the Government and the contractor, and the Illinois Central alleges nothing to the contrary. It merely claims that because the Government reserved the right of inspection at destination, the shipments, *ipso facto*, were shipments for private parties instead of the Government. Years later (some of the items were held barred by the statute of limitations) the Illinois Central not only repudiates its own position but that of the Government and its contractors.

In dismissing the petition the Court of Claims said (Tr. 9):

> The United States and the contractors were privileged to write into their contract such terms as they saw fit, and a third party, even though incidentally interested as a carrier, may not give an effect to one provision other than that plainly intended by the parties because the parties themselves saw fit to agree to other terms regarded by it as inconsistent therewith. Provisions for a final inspection at point of delivery or for the rendering of a further service by the contractor at that point were not inconsistent with and could not be invoked to nullify a specific provision under which the title to the property passed to the United States by delivery at the initial point of shipment to the carrier as agent. Land-grant rates were applicable.
>
> In rendering its bills the plaintiff itself made land-grant deductions from commercial rates, claimed only the land-grant rate resultant from such deductions, and accepted payment thereof without protest. It is thus estopped to assert a further claim for the same service except upon a showing of fraud or mistake of fact. There is no proof that the plaintiff was in any way deceived or mistaken as to the facts or was not fully informed with reference thereto when it rendered the service, presented its bills, and received payment thereof. *B. & O. case*, 52 C. Cls. 468; *Oregon-Wash. case*, 54 C. Cls. 131, affirmed 255 U. S. 339.

In *Oregon-Washington Railroad Co.* v. *United States*, 255 U. S. 339, 343, in affirming the judgment of the Court of Claims which denied the right of the railroad company to recover on the basis of the full commercial rates (from which it had itself made the land-grant deductions) this court, speaking through Mr. Justice McKenna, said:

> There were findings of fact which show that the accounts were presented for payment to the proper accounting officers of the Government in the regular way and payments were made by the disbursing officers of the Government on vouchers certified to be correct and presented by appellant. The charges so presented and paid were at rates for such transportation over land-grant roads fixed in certain agreements known as the "Land-grant equalization agreements," by which, to quote from the findings, "the carriers agreed, subject to certain exceptions—not material here to be noted—to accept for the transportation of property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement." That is, such freight was accepted by the carriers without prepayment of the charges therefor upon the basis of the commercial or tariff rates with appropriate deductions on account

> of land-grant distance as provided in the railroad land-grant acts. It is manifest, therefore, that the commercial rates were higher than the land-grant rates, and this action is to recover the difference between them and the land-grant rates presented for payment, as we have said, by appellant, and paid by the transportation officers of the Government.

In *New York, New Haven & Hartford* v. *United States*, 251 U. S. 123, 127, this court, in affirming the judgment of the Court of Claims which denied the right of the company to recover additional compensation for carrying the mails, speaking through Mr. Justice McReynolds, said:

> And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it can not now claim an implied contract for a greater sum.

In *New York, New Haven & Hartford* v. *United States*, 258 U. S. 32, 33, citing the last foregoing case, this court, in affirming the judgment of the Court of Claims which dismissed the petition of the railroad company which sought to recover express rates for carrying gold from Philadelphia to Boston, speaking through Mr. Justice Holmes, said:

> The claimant admitting that it could not demand additional pay for hauling the mails, *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, argues that the transaction was not "mail service" such as it had contracted to perform or within the

classification of mail matter. It urges that in view of the weight limit, 11 pounds, in force July 1, 1913, when its four-year term began; the weight of these bags, 18¾ pounds; of the contents, gold; and of the fact that the bags were sealed and placed in locked pouches, the Postmaster General could not make the service mail service if he tried. We think it unnecessary to discuss the argument, if there is anything in it. The service here, rightly or wrongly, was demanded as mail service, was rendered as mail service, and was paid for without protest as mail service. Whether the Treasury technically complied with all the requirements of the statute concerning postal service did not matter to the claimant. By giving its claim a different name from that passed upon in *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127, the claimant does not better its case.

II

IF THEY WERE OF ANY CONCERN WHATEVER TO THE ILLINOIS CENTRAL, THE TRANSACTIONS BETWEEN THE UNITED STATES AND ITS CONTRACTORS CONCLUSIVELY SHOW THAT THE TITLE TO THE PROPERTY VESTED IN THE GOVERNMENT F. O. B. POINT OF SHIPMENT AND ITS RIGHT TO INSPECT AND REJECT AT POINT OF DELIVERY DID NOT CHANGE ITS OWNERSHIP OF THE PROPERTY IN TRANSIT

It does not appear that a single shipment was ever rejected at destination. On the contrary, all shipments were received at point of delivery and the purchase price paid according to the contract. If, after inspection, the Government had rejected any article at destination, payment therefor would simply

have been refused and the consignor left with the article on his hands at that point. The number of shipments in the instant case indicates that the practice is general on the part of the Government officers. They openly published that shipments were so handled in order that the Government might get the benefit of land-grant deductions. Probably for that reason the Illinois Central makes no charge of fraud, misrepresentation, deceit, or suppression of material facts. If the Government owned this property, it was entitled to land-grant deductions. If the Government did not own this property, how may any freight charge whatever, with or without land-grant deductions, be claimed against it? How may the Illinois Central bring suit against the Government to recover the equivalent of the land-grant deductions to meet the full tariff charge and at the same time allege that the Government was not owner and shipper of this property? If the title was not in the Government it certainly was in the consignors and the Government was not liable for anything.

In *Hatch* v. *Oil Company*, 100 U. S. 124, 134, 135, Mr. Justice Clifford, speaking for the court, said:

> Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer, and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties (citing cases).
>
> "There is no rule of law (quoting Blackburn, J., in *Calcutta Co.* v. *De Mattos*) to prevent the

parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them *whether delivered at the port of destination or not, this intention is effectual.*"

* * * * *

Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous, and decisive. * * *

Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, *the title passes*, although there remains something to be done in order to ascertain the total value of the goods specified in the contract.

The very fact that the property was delivered to the carrier f. o. b. at the mines, mills, and factories of the contractors and shipped to defendant on regular Government bills of lading, which recited that the articles were "Government property," is conclusive proof of the ownership in the Government from the time of receipt by the carrier.

On delivery of the property by the contractors to the carrier f. o. b. cars at the mines and mills and shipment on regular Government bills of lading,

which is the inflexible rule in the movement of Government property, the title thereto vested immediately in the Government.

> It is the general rule in the ordinary course of mercantile transactions that a delivery to a carrier for shipment is a delivery to the consignee, i. e., it is delivery to the carrier as agent of the consignee, and the property in the goods vested in the latter from the moment of such delivery.
>
> *The Carlos F. Roses*, 177 U. S. 655, 663.
> *Oil Company* v. *Van Etten*, 107 U. S. 325,333.
> *Halliday* v. *Hamilton*, 11 Wall. 560.

Illinois Central contends that because the Government reserved the right to make final inspection, take samples, and make analysis of the property at the points of destination, notwithstanding all prior inspections at the points of shipment, title remained in the contractors while the property was being transported over carrier's lines and continued in them until the right had been exercised and the property finally accepted.

The provisions in the specifications, proposals, and contracts as to the right of the Government to inspect, either at the mines, mills, and factories or at points of destination, as a basis for determining the price to be paid did not in any degree affect the passing of the title to the property to the Government.

In *Gibson* v. *Stevens*, 49 U. S. 383, 399, this court said:

> This mode of transfer and delivery has been sanctioned in analogous cases by the courts

> of justice in England and this country, and is absolutely necessary for the purposes of commerce. A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. * * * The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery. The contract between the plaintiff and McQueen & McKay having been made in New York, the articles in the warehouses at Fort Wayne were incapable of actual delivery; consequently, the delivery of the evidences of title, with the order to the bailees indorsed on them, passed the title and possession to the plaintiff.

In purchasing this property the agents of the United States undertook to protect the interests of the Government by having placed in the contracts a clause which provided that any articles of property not coming up to requirements of the specifications and proposals might be rejected, and to determine whether or not the property did meet the requirements provisions were made for inspection, sampling, and analysis. These provisions were equivalent to an option to rescind and return.

In *Guss* v. *Nelson*, 200 U. S. 298, 302, this court said:

> While an option is given by the contract, and the price paid for the option is named,

> yet it contains other clauses which are equally binding and from which liability arises. Option contracts are not all alike. As said in *Hunt* v. *Wyman*, 100 Massachusetts, 198, 200, quoted approvingly by this court in *Sturm* v. *Baker*, 150 U. S. 312, 329:
>
> "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

In *Pope* v. *Allis*, 115 U. S. 363, 372, which involved the question of the right to inspect and reject a consignment of iron shipped f. o. b. cars Milwaukee, this court said:

> And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer* v. *Smith*, 1 B. & C. 1; *Magee* v. *Billingsley*, 3 Ala. 679.

In *Pierson* v. *Crooks*, 115 N. Y. 539, 548, in a similar case involving the right of inspection and rejection of a shipment of iron delivered f. o. b.

carrier at Liverpool, Mr. Justice Andrews in speaking for the court said:

> * * * where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, * * *.

Citing *Pope* v. *Allis*, 115 U. S. 363, Mr. Justice Andrews continued (p. 549):

> The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to purchasers, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered.

CONCLUSION

The judgment of the Court of Claims was right, and should be affirmed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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IN THE

Supreme Court of the United States

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
v.
THE UNITED STATES.

No. 248.

MOTION OF APPELLANT TO REMAND TO COURT OF CLAIMS FOR AMPLIFICATION OF FINDINGS OF FACT.

BENJAMIN CARTER,
Attorney for Appellant.

IN THE

Supreme Court of the United States

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
v.
THE UNITED STATES.

No. 248.

MOTION OF APPELLANT TO REMAND TO COURT OF CLAIMS FOR AMPLIFICATION OF FINDINGS OF FACT.

The appellant by its attorney shows to the court the following facts:

1. Parts of the findings of fact made by the Court of Claims in this case viz., paragraph III, appendix A (Record, pp. 4, 9, 10, 11), relate to coals obtained by Government officers from producers or dealers for use in river improvements in the vicinity of Dubuque, Iowa, and the same were obtained under contracts which permitted the Government officers, upon delivery of the coals at Dubuque, to reject them because of excess of volatile matter or sulphur or because of yielding, upon test, excessive clinkerage or for other reason proving to be undesirable fuel.

2. Other parts of said findings of fact, viz., paragraph V, appendix A (Record, pp. 5, 11, 12), relate to coals similarly obtained for use in improvements of the Missouri River. The coals were obtained under contracts which required that the dealers deliver the same into barges belonging to them, navigated on said river, and should remain on said barges until the progress of the work should require withdrawals therefrom, and that no demurrage, rental or other charges should be paid by the United States for such use of the barges.

3. Findings setting up said matters were proposed in appellant's request for findings of fact, upon which the case was heard by the Court of Claims, but the findings as made by the court say nothing on either of these subjects. After the judgment appellant, by leave of the court, filed a motion with brief for amendment of the findings, so as to include said facts; but the court denied the motion.

4. Attached hereto as Exhibit A is a copy of said motion of appellant purporting to quote provisions of the contracts relative to said matters.

5. There was no evidence before the court on said matter except such contracts.

Appellant deems that said features of said contracts are material evidence on the question of the title to the freights while in transit. It moves that this court remand the case to the Court of Claims with directions that it (a) determine whether said contracts contained in said motion are true quotations from the papers constituting such contracts and, if so, it (b) add the same, by proper reference, to its said findings of fact, and that (c) it find

how, if in any way, said contracts, or any of them, was construed and applied by any of the responsible officers of the United States on the question of paying the sellers for coal shipped, if any, which did not reach destinaton.

BENJAMIN CARTER,
Attorney for Appellant.

District of Columbia, ss:

Before me this day appeared Benjamin Carter, whose name is signed as attorney to the foregoing motion, made oath that all of the statements contained in said motion are true.

Subscribed and sworn to before me, this 18th day of April, 1924.

JESSE L. CONWELL,
Notary Public.

EXHIBIT A

IN THE COURT OF CLAIMS

THE ILLINOIS CENTRAL RAILROAD COMPANY,
v.
THE UNITED STATES. } No. 33955.

MOTION OF CLAIMANT TO AMEND FINDINGS OF FACT

Claimant by its attorney moves that the court will amend as below its findings of fact filed, when judgment was entered dismissing the petition, on May 1, 1922. Appendix A.

I. Instead of "cause for rejection" on page 7, insert: "19. Coal containing percentages of volatile matter or sulphur higher than the limits indicated under 'description of coal desired,' or having a moisture content in excess of that guaranteed, or containing percentages of ash greater than indicated in the column 'maximum limits for ash' in the table in the section entitled 'price and payment,' or failing to give satisfactory results because of excessive clinkering, or proving for any other cause to be an undesirable fuel, will be subject to rejection, and the Government will have the right to cause the contractor to remove such coal at no cost to the Government." Page 12.

II. Insert next before the caption "XIV Delivery, etc.," the following:

27. Alternate bids will be considered for furnishing the quantities and qualities of bituminous lump coal and screenings named in the foregoing specifications, and subject to the said specifications in every respect, except that delivery shall be made on barges in the manner and to the localities hereinafter named.

III. After table of localities and distances on page 12 insert the following:

(c) After delivery the contractor's barges will be retained and used by the United States for the purpose of storing the coal until required for use and of transporting it from the place of delivery to the place of use. The barges will be unloaded as rapidly as the exigencies of the work permit; but coal will be taken from barges only as required for consumption by the dredges, steamboats, and other plant, and as the rate of coal consumption by the dredges, will depend largely upon the amount of dredging and other work required during the low-water season, no time limit for the return of the barges can be fixed. No demurrage, rental, or other charge will be allowed or paid to the contractor for the use of his barges or for any delay in their return to him.

BRIEF

Each of these proposed inserts is copied from the proposals of the contracts and from claimant's request for findings relative thereto. (Record, pp. 41, 50, 87, 89.)

In the first of these matters the mere caption set out by the court "Causes for rejection" does not indicate that coals could be rejected for any other than absolute physical reasons, the results of tests. In reality the language was that a failure "to give satisfactory results because of excessive clinkering, or proving for any other cause to be an undesirable fuel," would be a ground for rejection. Under these phrases there was an uncontrolled discretion in somebody to make rejections according to his judgment or taste. "Satisfactory" refers to a sub-

jective, not objective condition. Of course the arbiter in this matter was the engineer or some other agent of the Government. Any coal that he elected not to receive as good could be rejected, no matter what its true qualties, or other man's judgment of it, might be.

The two other proposed inserts are more important still. There is nothing in the findings to indicate that the Government did not receive the coals from the shippers at the end of the railroad haul. In reality, as the proposed additional matter shows, the coals were to be loaded from cars, by the shippers, on to the shippers' barges, by which they were carried to the places of use. Until unloaded at those places they were in the shippers' charge and at the shippers' risk. How then can it be questioned that they belonged to the shippers until finally unloaded? If by a storm or other accident any of them had been sunk or drifted away, on whom would the loss have fallen? On the shipper, of course.

Claimant at this stage could hardly expect that if these amplifications are made in the findings, any change of the court's decision and judgment will follow; but the case will be appealed, and claimant trusts that the court will give it for that use the more adequate record which is sought by this motion.

BENJAMIN CARTER,
Attorney for Claimant.

Endorsement.
Filed June 27, 1922.

A true copy.
Test this April 22, 1924.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.